

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 MARISSA SKINNER,

5 Plaintiff,

6 v.

7 GEICO CASUALTY INSURANCE
8 COMPANY,

9 Defendant.

Case No. 2:16-cv-00078-APG-NJK

**ORDER (1) DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; (2) GRANTING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT; AND (3)
DIRECTING PARTIES TO FILE A
MOTION TO SEAL IF WARRANTED**

(ECF Nos. 34, 37)

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11 Plaintiff Marissa Skinner was injured in a car accident involving an underinsured driver.
12 Skinner was driving a car owned by Barbara Cutler, who was insured under a policy issued by
13 defendant GEICO Casualty Insurance Company. Skinner made a claim as an insured under
14 Cutler's policy for underinsured benefits. GEICO's top offer to settle the claim was \$51,000.
15 Skinner rejected that offer and brought suit alleging breach of contract, unfair claims practices,
16 bad faith, and negligent misrepresentation. Skinner moves for summary judgment on her breach
17 of contract claim. GEICO moves for summary judgment on Skinner's extra-contractual claims. I
18 deny Skinner's motion, grant in part GEICO's motion, and direct any party seeking to keep
19 Skinner's filings under seal to file a properly supported motion to seal.

20 **I. BACKGROUND**

21 Skinner was injured in an auto accident on July 19, 2014. ECF No. 35-2. There is no
22 dispute that the other driver was at fault for failing to yield. *Id.* There also is no dispute that
23 Skinner is an insured under a GEICO policy issued to Cutler, who owned the vehicle that Skinner
24 was driving at the time of the accident. ECF Nos. 36-2; 40-1 at 3-4. Cutler's policy has an
25 uninsured/underinsured policy limit of \$100,000 per person. ECF No. 36-2.

26 Skinner went to the emergency room complaining of pain in her right hand, right ankle,
27 and neck. ECF No. 35-11 at 9, 12. She also complained of pain in her abdomen. *Id.* at 10. X-rays
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1 showed no broken bones, and a CT scan showed no acute intra-abdominal injury. *Id.* She was
2 advised to use over-the-counter pain medication and released. *Id.* at 10, 13.

3 In September 2014, Skinner's counsel contacted GEICO, requested a copy of the
4 insurance policy, and inquired about the policy limits. ECF No. 35-4. GEICO responded by
5 requesting copies of medical documentation and lost wage verification. ECF No. 35-6. GEICO
6 also requested Skinner sign and return authorizations to obtain medical and wage information. *Id.*
7 According to GEICO, Skinner never returned the medical authorization. ECF Nos. 28 at 2; 40-2
8 at 9.

9 The at-fault driver had a policy limit of \$15,000 per person for bodily injury, with a total
10 of \$30,000 per accident. ECF No. 35-5. GEICO was aware in February 2015 that the at-fault
11 driver's insurer was admitting liability and that there was a "10k" limit issue. ECF No. 38-3 at 17.
12 In June 2015, the at-fault driver's insurer sent GEICO the declaration page showing the
13 applicable policy limits. ECF No. 35-10. The collision portion of the claim for damage to
14 Cutler's vehicle was closed on July 9, 2015. ECF Nos. 35-3 at 16; 49-4 at 8.

15 On September 1, 2015, Skinner's attorney faxed a demand letter to GEICO. ECF No. 35-
16 11; 35-12; 35-13; 35-14. The letter identified \$48,173.97 in medical specials. *Id.* Skinner's
17 counsel demanded the \$100,000 underinsured policy limit of Cutler's policy. *Id.* at 5. Attached to
18 the demand letter were medical records from various providers Skinner visited following the
19 accident. *Id.* at 7-40; ECF No. 35-12 at 1-20. For example, Skinner was treated by Dr. Jordan
20 Anderson. ECF No. 35-12 at 21-31. Dr. Anderson stated Skinner reported headaches and pain in
21 her neck, back, and right foot, none of which she had experienced prior to the accident. *Id.* at 23-
22 24. Dr. Anderson diagnosed a right foot contusion; muscle spasms; cervical, thoracic, and
23 lumbosacral sprain/strain; and post-traumatic headaches. *Id.* at 35-12. Dr. Anderson
24 recommended chiropractic treatment, trigger point therapy, electrical muscle stimulation, hot and
25 cold packs, and therapeutic exercises. *Id.* at 26-27.

26 The demand letter also attached records from Dr. Jorg Rosler from the Interventional Pain
27 and Spine Institute. ECF No. 35-13 at 16-22. Dr. Rosler's review of an MRI showed disc bulging
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1 at C4-5 and C5-6, and disc protrusions at L4-5 and L5-S1 with some spinal canal stenosis at L4-5.
2 *Id.* at 17. Dr. Rosler recommended injections and to continue chiropractic treatment with Dr.
3 Anderson. *Id.* Skinner thereafter received injections from Dr. Rosler. *Id.* at 18-22; ECF No. 35-
4 14 at 1-10. In June 2015, Skinner underwent radiofrequency ablation of the right C5, C6, and C7.
5 ECF No. 35-14 at 5. At her last treatment in July 2015, Skinner reported her pain at 1 out of 10
6 and that she was symptom-free in her lumbar spine. *Id.* at 9. She was discharged from Dr.
7 Rosler's care at maximum medical improvement. *Id.* at 10. Although Skinner received treatment
8 from other providers before this demand letter was sent, the letter did not refer to those providers
9 or attach related medical records. ECF No. 49-3 at 5-6. The letter also did not include all bills for
10 the Neck and Back Clinic. *Id.* at 10. There was no indication in the letter or the attached records
11 that Skinner was going to seek future treatment. ECF Nos. 35-11; 49-3 at 14.

12 GEICO's records do not show it received the September 1 demand letter. ECF No. 35-3 at
13 15-16. However, the fax cover sheet shows it was sent to GEICO's general fax number. ECF No.
14 44-2 at 11.

15 On October 12, 2015, Skinner's attorney contacted GEICO and stated he had sent a
16 demand over thirty days ago but had not received a response. ECF No. 35-3 at 15. GEICO
17 responded that it had no record of the demand but that a new adjuster would be assigned to handle
18 Skinner's claim. *Id.* The next day, GEICO employee Daliz Rodriguez contacted Skinner's
19 attorney and apologized for the lack of response, stating that GEICO had not received the
20 September 1 demand. *Id.* Rodriguez requested a two-week extension to evaluate the claim and
21 make an offer. *Id.* Skinner's counsel re-sent the demand letter and attachments but rejected
22 Rodriguez's request for an extension of time. *Id.* Rodriguez sent a letter to Skinner's counsel
23 requesting confirmation of the at-fault driver's policy limits and any settlement amount with the
24 at-fault driver. ECF No. 35-15.

25 Despite counsel's refusal to grant an extension, Rodriguez reviewed the claim. ECF No.
26 35-3 at 6-7. Rodriguez valued Skinner's claim at \$45,065.97 in medical specials, discounting the
27 demand letter's full requested amount because the bills provided did not establish some of the
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1 claimed amounts (specifically for the Neck and Back Clinic). ECF Nos. 35-18; 45-2 at 4.
2 Rodriguez valued Skinner's pain and suffering damages at a range of \$14,000 to \$17,000. ECF
3 No. 35-18. Rodriguez thus identified a negotiation range of \$49,065.97 to \$52,065.97. *Id.* On
4 October 19, he made an offer of \$49,100 to settle Skinner's claim. ECF Nos. 35-3 at 67; 35-19.
5 However, Skinner had already filed this lawsuit on October 15, 2015. ECF No. 35 at 3.

6 During an October 27 phone call with Skinner's counsel, Rodriguez raised the offer to
7 \$51,000, and sent an offer letter in that amount that same day. ECF Nos. 35-3 at 3-4; 35-20.
8 Rodriguez followed up on the offer on December 8. ECF No. 35-22. GEICO did not receive a
9 response to its last few letters to Skinner, and Skinner did not respond to several letters asking her
10 to complete a Medicare beneficiary form. ECF No. 38 at 3. Skinner filed an amended complaint
11 on December 2, 2015. ECF No. 1-1. GEICO was served with the summons, complaint, and
12 amended complaint approximately two weeks later. ECF Nos. 35 at 4; 35-24.

13 After suit was filed, Skinner disclosed she was seeking compensation for additional
14 medical specials, for a revised total of \$62,780.02. ECF No. 40-6 at 3; *see also* ECF No. 45-3 at
15 9, 20-23 (identifying additional treatment for neck pain starting in October 2015 through
16 February 2016). She also claimed she was entitled to future medical treatment and future pain
17 and suffering. ECF No. 40-6 at 4.

18 In October 2016, Skinner was evaluated by Dr. Hugh Selznick. ECF No. 45-3. At that
19 evaluation, Skinner reported she continued to experience sporadic neck pain and related
20 headaches. ECF No. 45-3 at 1-4, 6. Dr. Selznick attributed Skinner's care through December
21 2014 as accident-related, but opined that Dr. Rosler's care "should in no way be attributed to [the]
22 subject accident." *Id.* at 7. He noted that Skinner reported to him that a dentist recently suggested
23 that her headaches may be the result of grinding her teeth. *Id.* at 9.

24 GEICO has not raised or lowered its offer of \$51,000 to settle Skinner's claim in response
25 to information obtained through discovery. GEICO has not paid Skinner any amount on her
26 underinsured claim. ECF No. 40-1 at 6.

II. LEGAL STANDARD

Summary judgment is appropriate if the movant shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

III. SKINNER’S MOTION FOR SUMMARY JUDGMENT (ECF No. 37)

Skinner argues that although GEICO admits she is an insured and has a valid underinsured motorist claim, GEICO refuses to pay anything on the claim despite offering what Skinner characterizes as the undisputed amount of \$51,000. Skinner also argues that by negotiating to settle the claim within a range, GEICO breached the contract by placing its own interests above its insured’s. Finally, Skinner argues GEICO breached the contract when it closed Skinner’s claim and denied that it had received the September 1 demand letter.

GEICO responds that the value of Skinner’s claim is disputed, and thus there is no undisputed amount which GEICO is contractually obligated to pay. GEICO argues neither the policy nor Nevada law requires an insurer to pay the amount of a pre-litigation settlement offer on an uninsured motorist claim to avoid breaching the insurance contract. GEICO argues that because bodily injury claims are subjective and there are questions about what injuries are causally related to the accident, there is no undisputed amount that GEICO is contractually required to pay. GEICO also argues there is no policy provision regarding GEICO closing a

1 claim or erroneously losing track of a demand letter, so it cannot be liable on a breach of contract
2 theory on these allegations either.

3 Under Nevada law, a plaintiff asserting a breach of contract claim must show “(1) the
4 existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the
5 breach.” *Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 920-21 (D. Nev. 2006) (citing
6 *Richardson v. Jones*, 1 Nev. 405, 405 (1865)). The insurance contract provides that GEICO will
7 provide uninsured motorist coverage and “will pay damages for bodily injury caused by accident
8 which the insured is legally entitled to recover from the owner or operator of an uninsured motor
9 vehicle” ECF No. 40-10 at 11 (emphasis omitted).¹

10 Viewing the facts in the light most favorable to GEICO, and assuming without deciding
11 that an insurer’s failure to pay an undisputed amount of an underinsured motorist claim would
12 breach the policy, issues of fact remain as to whether there was any undisputed amount in this
13 case prior to the time the amended complaint was filed. A reasonable jury could conclude that
14 GEICO’s evaluation of a range of amounts to fully negotiate the claim (including pain and
15 suffering) is not equivalent to a determination that any particular amount of that claim is
16 undisputed. Skinner potentially had not fully complied with her duty to cooperate. *See* ECF No.
17 40-2 at 9 (GEICO’s Rule 30(b)(6) witness testifying that Skinner did not return a medical
18 authorization as requested). There is no evidence GEICO had investigated whether Skinner had
19 preexisting injuries or whether all of the medical treatments were causally connected to the
20 accident (Selznick later opined some were not). And the amount of damages for pain and
21 suffering is inherently subjective. *See Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 686 P.2d 925,
22 932 (Nev. 1984). A reasonable jury could find that the amounts GEICO offered were for
23 settlement purposes, not because there were undisputed amounts owed. I therefore deny
24 Skinner’s motion based on her argument that GEICO’s settlement offers were undisputed
25 amounts that GEICO was contractually obligated to pay.

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28 ¹ The policy applies equally to operators of underinsured motor vehicles. *Id.*

1 To the extent there may be a basis to conclude a certain amount of medical specials
2 became undisputed at some point after the amended complaint was filed, Skinner did not move to
3 supplement the amended complaint to add a claim that GEICO breached the policy at that point.
4 *See* Fed. R. Civ. P. 15(d). Even if that claim could be considered part of this case, Skinner did
5 not move for judgment on that undisputed amount. She does not identify in her motion what that
6 amount would be or when that amount became undisputed. Thus, GEICO has been deprived of
7 the opportunity to respond by explaining why that amount was disputed or why it would be
8 prejudiced by paying the allegedly undisputed amount. *See* Nev. Admin. Code § 686A.675(7)
9 (“Except for a claim involving health insurance, any case involving a claim in which there is a
10 dispute over any portion of the insurance policy coverage, payment for the portion or portions not
11 in dispute must be made notwithstanding the existence of the dispute where payment can be made
12 without prejudice to any interested party.”).

13 Skinner argues that by negotiating to settle the claim within a range and offering less than
14 the highest amount, GEICO placed its own interests above its insured’s. But that is an extra-
15 contractual claim, not a breach of contract claim. *See Allstate Ins. Co. v. Miller*, 212 P.3d 318,
16 324-26 (Nev. 2009) (en banc); *Powers v. United Servs. Auto. Ass’n*, 962 P.2d 596, 603 (Nev.
17 1998), *opinion modified on denial of reh’g*, 979 P.2d 1286 (Nev. 1999). Skinner does not point to
18 any provision in the contract (as opposed to a duty imposed by law) that requires GEICO to
19 consider its insured’s interests as equal to its own. Likewise, Skinner does not identify any
20 contractual provision GEICO breached by closing and then reopening the claim or by denying
21 that it had received the September 1 demand letter. I therefore deny Skinner’s motion.

22 **IV. GEICO’s MOTION FOR SUMMARY JUDGMENT (ECF No. 34)**

23 **A. Bad Faith**

24 GEICO argues it did not act in bad faith when it negligently failed to respond to the
25 September 1 demand letter. Rather, GEICO argues, it was unaware of that letter until Skinner’s
26 counsel called in mid-October inquiring about the lack of response. GEICO contends that once it
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1 was aware of the claim, it responded within six days with an offer. Additionally, GEICO argues
2 that it cannot be liable for bad faith because the evidence shows this is a good
3 faith dispute over valuation of Skinner's claim. GEICO contends there is no evidence it knew or
4 should have known that it lacked a reasonable basis for its valuation of Skinner's claim.

5 Skinner responds that GEICO acted in bad faith by failing to pay the undisputed value of
6 her claim after GEICO valued her claim at the top end of its range of \$52,065.97. Skinner also
7 contends this is not a good faith dispute over value because GEICO failed to investigate or
8 consider her permanent injuries or the fact that she was still treating for her injuries, and GEICO
9 did not reevaluate its offer after receiving evidence of additional medical expenses. Additionally,
10 Skinner argues that the policy's requirement that GEICO and the insured reach an agreement as to
11 the amount of the underinsured motorist claim before GEICO will pay places GEICO's interests
12 ahead of its insured's.

13 Insurers have a special relationship with their insureds that arises under the implied
14 covenant of good faith and fair dealing. *Miller*, 212 P.3d at 324. "A violation of the covenant
15 gives rise to a bad-faith tort claim." *Id.* Bad faith in the insurance context means, among other
16 things, "an actual or implied awareness of the absence of a reasonable basis for denying benefits
17 of the [insurance] policy." *Id.*

18 *1. Failure to Pay Policy Limits*

19 To establish a claim for bad faith based on a denial of payment on all or part of a claim, a
20 plaintiff must establish that "(1) her claim was denied, (2) the denial was unreasonable, and (3)
21 the insurer knew it lacked a reasonable basis to deny the claim, or acted with reckless disregard as
22 to the unreasonableness of the denial." *Sherwin v. Infinity Auto Ins. Co.*, No. 2:11-cv-00043-
23 APG-GWF, 2013 WL 5918312, at *3 (D. Nev. Oct. 31, 2013), *aff'd*, 639 F. App'x 466 (9th Cir.
24 2016). "The key to a bad faith claim is whether or not denial of the coverage was reasonable." *Id.*
25 (quotation omitted). Consequently, if the insurer had a reasonable basis for its valuation, there
26 can be no finding of bad faith as a matter of law. *Id.*

1 Even viewing the facts in the light most favorable to Skinner, no reasonable jury could
2 find GEICO acted in bad faith. The evidence shows a genuine dispute over the value of Skinner's
3 claim. In its pre-litigation offer, GEICO accounted for all properly supported medical specials
4 and assigned a range of values for pain and suffering. Because the value assigned to pain and
5 suffering is subjective, there is no evidence that GEICO's offer was unreasonable or that GEICO
6 knew or should have known it lacked a reasonable basis to offer the amount it did. Skinner
7 contends GEICO failed to account for permanent injuries or future treatment, but the September 1
8 demand did not mention future treatment and it appeared from the medical records that Skinner
9 had stopped treating.²

10 As with the breach of contract claim, Skinner did not amend or supplement her complaint
11 to add claims related to GEICO's alleged post-amended-complaint conduct in this litigation.
12 Thus, GEICO's purported refusal to reconsider its offer in light of additional medical specials
13 revealed through discovery is not a part of this case. Even if it were, other evidence in discovery
14 suggested not all of Skinner's injuries were causally related to the accident. GEICO thus had an
15 evidentiary basis to both raise or lower its offer. In sum, this portion of Skinner's bad faith claim
16 is a genuine dispute over value, and no reasonable jury could find bad faith on GEICO's valuation
17 of the claim. I therefore grant GEICO's motion for summary judgment on this portion of
18 Skinner's bad faith claim.

19 2. *Giving Equal Consideration to Insured's Interest*

20 Skinner argues GEICO acted in bad faith by not placing its insured's interests equal to its
21 own in two respects: (1) by failing to pay the undisputed value of her claim after GEICO valued
22 her claim at \$52,065.97 at the top end of its range, and (2) by requiring the insured to agree with
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24 ² Skinner presents an affidavit from her own attorney claiming that he told Rodriguez during an
25 October 13, 2015 phone call that Skinner was still treating. ECF No. 44-8 at 3. Even if I considered this
26 affidavit over GEICO's objection, that does not raise a triable issue. Skinner's counsel states he told
27 Rodriguez that Skinner "was still receiving medical treatment and the value of her permanent spinal
28 injuries related to this incident" exceeded the policy limit. *Id.* Given the lack of specificity as to what
treatment was being continued or what spinal injuries were permanent, there is no basis to conclude
GEICO unreasonably valued the claim or knew or recklessly disregarded that its valuation was
unreasonable.

1 GEICO on the amount of the underinsured claim before GEICO will pay. GEICO does not
2 directly respond to these arguments, but it generally argues that nothing in Nevada law requires
3 an insurer to make partial payment on a disputed uninsured motorist claim.

4 The nature of the relationship between the insurer and its insured “requires that the insurer
5 adequately protect the insured’s interest.” *Powers*, 962 P.2d at 603. “Thus, at a minimum, an
6 insurer must equally consider the insured’s interests and its own.” *Id.*

7 “When there is a genuine dispute regarding an insurer’s legal obligations,” I may
8 “determine if the insurer’s actions were reasonable.” *Miller*, 212 P.3d at 329-30. In making this
9 determination, I evaluate “the insurer’s actions at the time it made the decision.” *Id.*

10 As discussed above, the range of values GEICO calculated was for purposes of settling
11 Skinner’s claim. It does not necessarily reflect an undisputed amount to which Skinner was
12 entitled. GEICO therefore did not breach its duty of good faith by failing to tender the top end of
13 the range (or even the bottom end of the range), as Skinner asserts. Moreover, there is no Nevada
14 law that would suggest to an insurer that in evaluating an underinsured claim, particularly one
15 that includes subjective evaluation of pain and suffering, an insurer breaches its duty of good faith
16 if it does not offer its insured the top end of the range of possible values it generates for
17 settlement purposes. Considering GEICO’s actions at the time it made its offer, and in the
18 absence of Nevada authority to the contrary, its decision to offer Skinner an amount within a
19 range of possible values was reasonable.

20 Indeed, GEICO has presented evidence that Nevada’s Division of Insurance previously
21 has found an insurer does not violate its duty under Nevada Administrative Code § 686A.675(7)
22 by failing to pay a settlement offer as the undisputed portion of an uninsured motorist claim. ECF
23 No. 49-9. That section provides that in “any case involving a claim in which there is a dispute
24 over any portion of the insurance policy coverage, payment for the portion or portions not in
25 dispute must be made notwithstanding the existence of the dispute where payment can be made
26 without prejudice to any interested party.” The Division of Insurance appears to have interpreted
27 the word “portion” in the phrase “any portion of the insurance policy coverage” to refer to the
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1 type of coverage (meaning medical, collision, or underinsured) rather than the amount in dispute
2 for a particular type of coverage. ECF No. 49-9. The Division thus concluded that the amount the
3 insurer offered to settle the disputed uninsured motorist claim “did not constitute an undisputed
4 portion of the claim” within § 686A.675(7)’s meaning. *Id.*

5 Even if this accurately describes an insurer’s obligations under § 686A.675(7), it does not
6 necessarily fulfill the insurer’s good faith obligations under the common law. The Supreme Court
7 of Nevada has not addressed these questions, and I need not do so here. It suffices to say that in
8 this case, no reasonable jury could find GEICO acted in bad faith by not paying Skinner the
9 highest amount by which GEICO internally valued the claim while generating an offer of
10 settlement.

11 Finally, Skinner’s argument that GEICO violated the duty of good faith by requiring
12 Skinner to agree to a total amount of the underinsured claim before GEICO would pay any
13 amount on the claim fails for the reasons already discussed. While there may be circumstances
14 where an insurer violates its duties by not paying an undisputed amount even if the remainder of
15 the claim is disputed (and thus the insurer cannot require the insured to agree to settle the entire
16 claim before paying undisputed portions), those circumstances do not exist here. GEICO’s range
17 of values was prepared for settlement, not as a reflection of undisputed amounts owed. Skinner
18 has not presented evidence of an undisputed amount GEICO refused to pay. I therefore grant
19 GEICO’s motion for summary judgment on Skinner’s bad faith claim.

20 **B. Unfair Claims Practices**

21 GEICO argues that an unfair practices claim requires a showing that a GEICO officer,
22 director, or department head knowingly permitted the unfair practice, and Skinner has not made
23 that showing. GEICO also argues there is no evidence it engaged in an unfair practice.

24 Skinner responds that GEICO ratified its employees’ actions because its Rule 30(b)(6)
25 witness was questioned during a deposition about its employees’ conduct, but GEICO did nothing
26 afterwards to remedy the alleged violations. Skinner also contends she has presented evidence
27 that GEICO: (1) failed to timely respond to the September 1 demand; (2) failed to pay on
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1 Skinner's claim under her own GEICO policy;³ (3) requested Skinner provide information that
2 was already in its possession; (4) refused to pay the undisputed amount of the claim; (5) failed to
3 consider aspects of her claim such as future treatment and permanent injuries; and (6) required
4 her to file suit to recover the undisputed portions of her claim.

5 Nevada Revised Statutes § 686A.270 provides:

6 No insurer shall be held guilty of having committed any of the acts prohibited by
7 NRS 686A.010 to 686A.310, inclusive, by reason of the act of any agent, solicitor
8 or employee not an officer, director or department head thereof, unless an officer,
director or department head of the insurer has knowingly permitted such act or has
had prior knowledge thereof.

9 Skinner has not presented evidence raising a genuine dispute that a GEICO officer, director, or
10 department head knowingly permitted the practices about which she complains. *See Hackler v.*
11 *State Farm Mut. Auto. Ins. Co.*, 210 F. Supp. 3d 1250, 1255 (D. Nev. 2016); *Yusko v. Horace*
12 *Mann Servs. Corp.*, No. 2:11-cv-00278-RLH-GWF, 2012 WL 458471, at *4 (D. Nev. Feb. 10,
13 2012). Skinner argues that GEICO's Rule 30(b)(6) witness became aware of the alleged
14 violations at her deposition yet GEICO has not redressed them, thereby ratifying the conduct.
15 However, the statute's unambiguous language requires prior knowledge, not after-the-fact
16 ratification. I therefore grant GEICO's motion for summary judgment on the unfair practices
17 claim.

18 **C. Punitive Damages**

19 GEICO argues that if its motion is granted as to the bad faith claim, then punitive damages
20 are not available as a matter of law on Skinner's other claims. GEICO also argues that even if the
21 bad faith claim survives, there is no evidence to support a punitive damage award. Skinner
22 responds that a reasonable jury could find malice based on the number of statutory violations,
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25 ³ In her opposition, Skinner refers to a claim she allegedly made under her own GEICO policy in
26 May 2016. However, that is not a part of this case. The amended complaint refers only to Skinner's claim
27 under Cutler's policy. ECF No. 1-1. Indeed, it could not be part of the amended complaint because
28 Skinner did not make a claim on her own policy until months after the amended complaint in this case was
filed. Skinner has not moved to amend or supplement to add allegations about GEICO's alleged
misconduct in relation to its handling of her claim under her own policy.

1 GEICO's misrepresentations, the unreasonable delay in payment, and the policy's language
2 compelling insureds to agree to an amount of damages or be forced to file suit.

3 Because I have granted judgment in GEICO's favor on the only claims that could support
4 a punitive damages award, I grant GEICO's motion as to punitive damages as well. Moreover,
5 there is insufficient evidence to support a punitive damages award in this case. *See United Fire*
6 *Ins. Co. v. McClelland*, 780 P.2d 193, 198 (Nev. 1989) ("Nevada follows the rule that proof of
7 bad faith, by itself, does not establish liability for punitive damages. To recover punitive
8 damages, plaintiff must also show evidence of 'oppression, fraud, or malice, express or implied.'"
9 (quoting Nev. Rev. Stat § 42.010, internal citation omitted)).

10 **D. Negligent Misrepresentation**

11 GEICO argues that Nevada law does not permit an insured to bring a negligence claim
12 against her insurer for denying or delaying payment because the insurer owes no duties beyond
13 the contractual requirements and the duty of good faith. Skinner responds that her negligent
14 misrepresentation claim is not based on GEICO's delay or denial of payment, but rather is based
15 on GEICO (1) denying it received the September 1 demand letter, and (2) representing in the
16 insurance policy that it would pay amounts owed to the insured by a third party under the
17 underinsured motorist coverage.⁴

18 Nevada has adopted the Restatement (Second) of Torts definition of negligent
19 misrepresentation. *See Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 575 P.2d 938, 940
20 (Nev. 1978). Under this theory of liability:

21 One who, in the course of his business, profession or employment, or in any other
22 action in which he has a pecuniary interest, supplies false information for the

23 ⁴ Skinner also argues GEICO gave a false reason for its denial of Skinner's claim under her own
24 policy. The amended complaint refers only to Skinner's claim under Cutler's policy. ECF No. 1-1.
25 Consequently, GEICO's conduct in relation to Skinner's claim under her own policy in May 2016 is not a
26 part of this case. Any misrepresentations GEICO made in relation to that claim could not be part of the
27 amended complaint because Skinner did not make a claim on her own policy until months after the
28 amended complaint was filed. Skinner has not moved to amend or supplement to add allegations about
GEICO's alleged misconduct in relation to its handling of her claim under her own policy. If Skinner
wants to pursue claims against GEICO for its alleged mishandling of that claim, she will have to do so in
another case.

1 guidance of others in their business transactions, is subject to liability for
2 pecuniary loss caused to them by their justifiable reliance upon the information, if
3 he fails to exercise reasonable care or competence in obtaining or communicating
4 the information.

5 Restatement (Second) Torts § 552 (1977); *see also Bill Stremmel Motors, Inc.*, 575 P.2d at 940.

6 *1. September 1 Letter*

7 Viewing the evidence in the light most favorable to Skinner, a genuine dispute remains
8 about whether GEICO received the September 1 demand but told Skinner's counsel it did not.
9 Skinner has presented evidence her counsel sent the letter to GEICO's fax number. Thus, a
10 reasonable inference is that GEICO received it. GEICO argues there is no evidence that the
11 particular employees who told Skinner's counsel that GEICO had not received the letter in fact
12 received it prior to it being re-sent. However, GEICO presents no legal authority that an entity
13 escapes liability for negligent misrepresentation if its employee conveys inaccurate information
14 so long as that particular employee did not know it was inaccurate. GEICO has not shown it is
15 entitled judgment as a matter of law, so I deny its motion on this portion of the negligent
16 misrepresentation claim.⁵

17 *2. Misrepresentations in the Policy*

18 Skinner contends the policy itself misrepresents that GEICO will pay underinsured
19 motorist claims. GEICO responds that there is no misrepresentation in the policy because GEICO
20 will pay upon Skinner proving the amount she is entitled to recover.

21 There is no genuine dispute in relation to this claim. "[A] misrepresentation as to future
22 performance cannot be negligent because such a statement is either fraudulent, i.e., the person
23 never held that intention at the time he made the statement, or it was not a misrepresentation at
24 all, the person simply later failed to perform as promised." *Cundiff v. Dollar Loan Ctr. LLC*, 726
25 F. Supp. 2d 1232, 1238 (D. Nev. 2010). Thus, GEICO is correct that there is no evidence of a
26 misrepresentation in the policy because there is no evidence that at the time of contracting,

27 ⁵ It is unclear how Skinner justifiably relied to her detriment on this alleged misrepresentation.
28 GEICO employees told Skinner's counsel they did not receive the demand and requested he resubmit it.
He did so, and GEICO evaluated the claim and made an offer in six days. Damages based on this alleged
misrepresentation may be difficult to prove at trial. However, GEICO did not argue in its motion that
Skinner cannot show reliance or damages, so Skinner has not had an opportunity to address these issues.

1 GEICO never intended to pay. Indeed, GEICO has offered to pay \$51,000. Skinner's dispute
2 with GEICO's valuation of her claim does not raise a genuine dispute that GEICO negligently (or
3 intentionally) misrepresented its willingness to pay valid claims.⁶ I therefore grant GEICO's
4 motion on this portion of the negligent misrepresentation claim.

5 **V. SEALED DOCUMENTS**

6 Skinner filed under seal her motion for partial summary judgment, an erratum, her
7 response to GEICO's motion for summary judgment, and her reply brief. ECF Nos. 37, 40, 44,
8 48. Skinner did not file a motion to seal these documents. LR IA 10-5.

9 Generally, the public has a right to inspect and copy judicial records. *Kamakana v. City &*
10 *Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Such records are presumptively publicly
11 accessible. *Id.* Consequently, a party seeking to seal a judicial record bears the burden of
12 overcoming this strong presumption. *Id.* In the case of dispositive motions, the party seeking to
13 seal the record must articulate compelling reasons supported by specific factual findings that
14 outweigh the general history of access and the public policies favoring disclosure, such as the
15 public interest in understanding the judicial process. *Id.* at 1178-79. Among the compelling
16 reasons which may justify sealing a record are when such court files might have become a vehicle
17 for improper purposes, such as the use of records to gratify private spite, promote public scandal,
18 circulate libelous statements, or release trade secrets. *Id.* at 1179. However, avoiding a litigant's
19 embarrassment, incrimination, or exposure to further litigation will not, without more, compel the
20 court to seal its records. *Id.*

21 I will allow the filings to remain sealed temporarily. If any party determines that any
22 portion of these filings should remain sealed, that party must file a motion to seal along with a
23 proposed redacted version of the filing within 14 days of the date of this order. Any motion to
24 seal must set forth compelling reasons to support sealing those portions. Failure to file a motion
25 to seal will result in these documents being unsealed.

26
27 ⁶ It is also unclear how Skinner could have relied to her detriment on the policy language because
28 the policy was issued to Cutler, not to Skinner. There is no evidence that Skinner reviewed or knew about
the policy language before she drove Cutler's car.

1 **VI. CONCLUSION**

2 IT IS THEREFORE ORDERED that plaintiff Marissa Skinner's motion for summary
3 judgment (**ECF No. 37**) is **DENIED**.

4 IT IS FURTHER ORDERED that defendant GEICO Casualty Insurance Company's
5 motion for summary judgment (**ECF No. 34**) is **GRANTED in part**. The motion is granted as to
6 Skinner's claims for bad faith and unfair claims practices, as well as related punitive damages.
7 The motion is also granted as to Skinner's negligent misrepresentation claim to the extent it is
8 based on an alleged misrepresentation in the policy. The motion is denied as to Skinner's
9 negligent misrepresentation claim to the extent it is based on the alleged misrepresentation that
10 GEICO did not receive the September 1 demand letter.

11 IT IS FURTHER ORDERED that if any party determines that any portion of ECF Nos.
12 37, 40, 44, or 48 should remain sealed, that party must file a motion to seal along with a proposed
13 redacted version of the filing. Any motion to seal must set forth compelling reasons to support
14 sealing those portions. If a motion to seal is not filed by any party within 14 days of the date of
15 this order, ECF Nos. 37, 40, 44, and 48 shall be unsealed.

16 DATED this 26th day of February, 2018.

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19 _____
20 ANDREW P. GORDON
21 UNITED STATES DISTRICT JUDGE
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